

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Environmental Protection Agency  
Region IX  
100 California Street  
San Francisco, California 94111

Dr. Henri Minette  
Assistant Director for  
Environmental Health  
Hawaii State Department of Health  
P.O. Box 3378  
Honolulu HI 96801

AUG 24 1973

Dear Dr. Minette:

Enclosed is the most recent analysis by our Regional Counsel (together with the previous opinions of February and June 7) of Hawaii's legal authority as it relates to State program elements necessary for participation in NPDES under Section 402 (b) of the Federal Water Pollution Control Act. This latest update includes the effect of proposed Chapter 45 of the Public Health Regulations forwarded to us by Dr. Quisenberry in a letter dated June 5, 1973.

We hope this information will assist you in obtaining the necessary authority and procedures for participation in NPDES.

Sincerely,

*T.L.S.*

*for* Richard L. O'Connell  
Director, Enforcement Division

Enclosures

cc: Dr. Richard E. Marland, Office of Environmental Quality  
Control, Governor's Executive Chambers, Honolulu HI

reading file DMowday/F belt # 3 8/13/73 426777 8/16/73  
8/21/73-B

*File #815.4*

CONCURRENCES							
SYMBOL	<i>DM</i>	<i>WHP</i>	<i>TLS for</i>				
SURNAME		<i>8/24/73</i>	<i>O'Connell</i>				
DATE	<i>8/22/73</i>		<i>8/24/73</i>				

*Memorandum*ENVIRONMENTAL PROTECTION AGENCY  
REGION IX

TO : RICHARD O'CONNELL, Director 302 DATE: June 7, 1973  
Enforcement Division

FROM : CASSANDRA DUNN, Regional Counsel

SUBJECT: Hawaii's Act 100 Amendments Necessary for Participation  
FWPCA 1972 NPDES

Dr. Richard Marland forwarded this office a copy of Amended Act 100 which altered Chapter 342, Hawaii Revised Statutes.

Our previous evaluation was based on "Act 100" as worded when approved by the Governor on May 22, 1972, and a proposed amendment to this Act which is dated January 8, 1973, on the "Justification Sheet." The new legislation does not add much to that which was contained in the prior amendment. To paraphrase, the new Bill would go beyond the old amendments in:

- (1) Amending Section 342-11 to raise the maximum civil fine to \$10,000 for each separate offense.
- (2) Adding to Section 342-31 a new subsection (9) which would define "New Source."
- (3) Deleting from Section 342-34 language regarding state funds for grants and adding provisions concerning federal funds, state funds and private funds.
- (4) Adding a new section 342-35 regarding conflict of interests of permit board members.

Thus, in considering the basic Act 100, and the newest amendments, our previous evaluation is updated with the following:

- Entry No. 1. Previously "authority assumed." Proposed amendments should not change this conclusion.
- Entry No. 2. Previously "authority assumed." Proposed amendments should not change this conclusion.
- Entry No. 3. Previously "vague but comprehensive authority." Proposed amendments should not change this conclusion.

- Entry No. 4. Previously "authority present." Proposed amendments should not change this conclusion.
- Entry No. 5. Previously "authority present." Proposed amendments should not change this conclusion.
- Entry No. 6. Previously "authority present." Proposed amendments should not change this conclusion.
- Entry No. 7. Previously "authority present." Proposed amendments should not change this conclusion.
- Entry No. 8. Previously "authority present." Proposed amendments should not change this conclusion.
- Entry No. 9. Previously "authority present." Proposed amendments should not change this conclusion.
- Entry No. 10. Previously "authority present" in part and "authority questionable" in part. Proposed amendments should not change this conclusion.
- Entry No. 11. Previously "authority lacking" in parts and "authority questionable" in part. Proposed amendments should not change this conclusion.
- Entry No. 12. Previously "authority lacking." Proposed amendments should not change this conclusion.
- Entry No. 13. Previously "authority lacking." This requirement now determined to be inapplicable to Hawaii. Please see Point 2 of the March 14, 1973 letter from C. Dunn to A. Goda.
- Entry No. 14. Previously "authority lacking." Proposed amendments should not change this conclusion.
- Entry No. 15. Previously "authority lacking." Proposed amendments should not change this conclusion.
- Entry No. 16. Previously "authority lacking." Portions of requirement now determined to be inapplicable to Hawaii. Please see Point 3 of the March 14, 1973 letter from C. Dunn to A. Goda.
- Entry No. 17. See Entry No. 27.
- Entry No. 18. Previously "authority lacking." Although the addition of subsection (9) to Section 342-31 is relevant to this requirement, authority is still lacking.

- Entry No. 19. Previously "authority lacking." Proposed amendments should not change this conclusion.
- Entry No. 20. Previously "authority lacking." Proposed amendments should not change this conclusion.
- Entry No. 21. Previously "authority lacking." Proposed amendments should not change this conclusion.
- Entry No. 22. Previously "authority lacking." Proposed amendments should not change this conclusion.
- Entry No. 23. Previously "authority present" in part and "authority questionable" in part. Proposed amendments should not change this conclusion. Please see Point No. 4 in the March 14, 1973, letter from C. Dunn to A. Goda.
- Entry No. 24. Previously "authority lacking." Proposed amendments should not change this conclusion.
- Entry No. 25. Previously "authority present." Proposed amendments should not change this conclusion.
- Entry No. 26. Previously "authority present - qualification may invalidate authority." Proposed amendments should not change this conclusion. See Point 5 of March 14 letter from C. Dunn to A. Goda.
- Entry No. 27. Previously "authority present" in part, "authority questionable" in part and "authority lacking" in part. Proposed amendments to Sec. 342-11 are pertinent to this requirement. The civil fines provided therein should satisfy the requirement of EPA Regulation 124.73(h). In our previous review, evaluation of this subsection was not included. Please note that our present evaluation of the requirements of 124.73(h) is "authority present" by virtue of Section 342-11. Also, see Item No. 6 in the letter from C. Dunn to A. Goda on March 14, 1973.
- Entry No. 28. Previously "authority lacking." Proposed amendments include a new section 342-35 which qualify for an "authority present" rating.

- Entry No. 29. Previously "authority lacking." Proposed amendments should not change this conclusion.
- Entry No. 30. Previously "authority lacking." Proposed amendments should not change this conclusion.
- Entry No. 31. Previously "authority probably lacking." Proposed amendments should not change this conclusion. See Item No. 7 in the March 14 letter.
- Entry No. 32. Previously "authority lacking." Proposed amendments should not change this conclusion.

Again, as in the letter of March 14, it should be pointed out that most if not all of the inadequacies existing in Hawaii's legislation and proposed legislation can be met by rules and regulations.

When I was in Honolulu the latter part of May, Nelson Chang (Alan Goda's replacement) stated he was working on regulations to implement Act 100 as amended and they should be complete by August 1973.

He said he had recommended regulations parallel to those published in the Federal Register and indicated this will probably be agreeable with the State.

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CASSANDRA DUNN

cc: AGCD  
(Office of General Counsel, Washington, D.C.)

HAWAII

STATE PROGRAM NECESSARY  
FOR PARTICIPATION NPDES

FWPCA 1972 Requirements:

1. 402(b)  
EPA Regulation \_\_\_\_\_

Governor's Request

Governor may submit full and complete description of program State proposes to establish and administer under State law or interstate compact.

COMMENT: Authority assumed

2. 402(b)  
EPA Regulation \_\_\_\_\_

Attorney General's Statement

Each requesting State shall submit a statement from the Attorney General (or attorney for the state agency having independent legal counsel) . . . that the laws of such State provide adequate authority to carry out described program.

COMMENT: Authority assumed.

3. 402(b) (1) (A)  
EPA Regulation 124.10 and Subpt, E, 124.41 - .45

Adequate authority . . . to issue permits to apply requirements of and comply with Sections 301, 302, 306, 307 and 403

- - Effluent limitations--"best practicable" treatment by July 1, 1977
- - National standards of performance
- - Toxic and pretreatment standards
- - Ocean discharge criteria

Section 324-6(c) "The Director shall issue a permit for any term not exceeding five years, if he determines that such will be in the public interest . . ."

COMMENT: Vague but comprehensive authority.

4. 402(b)(1)(B)  
EPA Regulation 124.51

Permits are to be for fixed terms, not exceeding five years.

Section 324-6(c) "The Director shall issue a permit for any term, not exceeding five years. . ."

COMMENT: Authority present.

5. 402(b)(1)(C)(i)  
EPA Regulation 124.45(b)(1)

Permit must be able to be modified or terminated for cause including but not limited to--(i) violation of condition of the permit.

Section 342-6(c) The Director may . . . modify, suspend or revoke any permit if . . . he determines that

- (1) There is a violation of any condition of the permit, or

COMMENT: Authority present.

6. 402(b)(1)(C)(ii)  
EPA Regulation 124.45(b)(2)

Permit must be able to be modified or terminated for cause including but not limited to--(ii) misrepresentation or failure to disclose fully all relevant facts.

Section 342-6(c)

- (2) The permit was obtained by misrepresentation, or failure to disclose fully all relevant facts, or

COMMENT: Authority present.

7. 402(b)(1)(C)(iii)  
EPA Regulation 124.45(b)(3)

Permit to be terminated or modified for cause including but not limited to--(iii) a change in any condition requiring either temporary or permanent reduction or elimination of permitted discharge.

Section 342-6(c)(3) There is a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

COMMENT: Authority present.

8. 402(b)(1)(D)  
EPA Regulation 124.80

State must be able to control the disposal of pollutants into wells.

Section 342-31(6) "State waters" means all waters, fresh, brackish or salt, around or within the State, including but not limited to . . . groundwaters.

COMMENT: Authority present.

9. 402(b)(2)(A)  
EPA Regulation Subpt G, 124.61 -.64

State must be able to apply and insure compliance with Section 308 to require point source to collect, monitor, maintain records and data, etc.

Section 342-32 . . . In the discharge of his duty, the director may: (10) require the owner or operator of any effluent source to (a) establish and maintain such records; (b) make such reports; (c) install, use and maintain such monitoring equipment or methods; (d) sample such effluent and such state waters; and (e) provide such other information as the Department may require.

COMMENT: Authority present.



10. 402(b)(2)(B)  
EPA Regulation 124.45(c)

State must be able to inspect, monitor, enter, as stated in Section 308.

Section 342-10 The Director may . . . enter and inspect any place (to investigate) an actual or suspected source of water . . . pollution and ascertaining compliance or noncompliance with this part, any rule regulation or standard promulgated by the Department, any permit or other approval granted by the Department and to make reasonable tests in connection therewith.

Section 342-32(11) The Director may . . . require any permittee (to allow the director) (a) to enter upon permittee's premises in which an effluent source (or required records) are located and (b) to inspect any required monitoring method or equipment, and (c) to sample any pollutant discharge.

COMMENT:

Section 342-10 Authority present.

Section 324-32 Authority questionable.

11. 402(b)(3)  
EPA Regulation 124.32 and 124.34

State shall insure public notification of each application and an opportunity for public hearing; State shall notify other government agencies and other States of each application and afford them opportunity to submit written recommendations.

Section 342-6(c) Paragraph 3. Director shall insure that the public receive notice of each application for a permit . . . He may hold a public hearing before ruling on an application for a permit to control water pollution if he determines such public hearing to be in the public interest.

COMMENTS:

Re: Public Notice - authority lacking.

Re: Public Hearing - Discretionary with Director and legal authority questionable.

Re: Notification to other  
agencies - authority lacking.

Re: Affording other agencies  
the opportunity - authority  
lacking.

12. 402(b)(4)  
EPA Regulation 124.23(a)

Statute requires State to insure that the Administrator receive notice of each application, including a copy. EPA Regulation requires State agency "notify other appropriate government agencies" of each complete application and provide them an opportunity to comment and make recommendations.

COMMENT: Authority lacking.

13. 402(b)(5)  
EPA Regulation 124.34(a)

State must insure it will receive recommendations from second affected States as to applications; State will notify such States of denial of their recommendations, with reasons in writing.

COMMENT: Authority lacking.

14. 402(d)(2)  
EPA Regulation 124.34, 124.41(c)

State must insure that no permit will issue if "vetoed" by Regional Administrator of EPA.

COMMENT: Authority lacking.

15. 402(b)(6)  
EPA Regulation 124.41(b)

State must insure that no permit will issue if "vetoed" by Corps of Engineers or Coast Guard on the basis of impairment of navigation or anchorage.

COMMENT: Authority lacking.

16. EPA Regulation 124.34(b)(d)(e)

State must insure notice of application is sent to inter-state agencies with water quality control authority over waters which may be affected by issuance of permit, and to any other federal, state or local agency upon request including notice to and coordination with public health agencies.

COMMENT: Authority lacking.

17. 402(b)(7)  
EPA Regulation 124.73(g)

State must insure to enforce conditions of the permit program including civil and criminal penalties.

COMMENT: See Entry No. 27

18. 402(b)(8)  
EPA Regulation 124.45(d)(1)

Regarding municipal treatment works, permittee shall insure that permitting agency gets notice (to be required in the permit) of (A) new source additions, new sources being defined in Section 306.

COMMENT: Authority lacking.

19. 402(b)(8)  
EPA Regulation 124.45(d)(2)

Regarding municipal treatment works, permittee shall insure permitting agency gets notice (to be required in permit) of (B) new introduction of pollutants from Section 301 source.

COMMENT: Authority lacking.

20. 402(b)(8)  
EPA Regulation 124.45(d)(3)

Regarding municipal treatment works, permittee shall insure permitting agency gets notice (to be required in permit) of (C) substantial changes in volume or character of effluent from existing sources, including quality and quantity of influent and expected resulting quality and quantity of effluent.

COMMENT: Authority lacking.

21. 402(b)(9)  
EPA Regulation 124.45(e)

State shall insure that industrial users of public works will comply with Section 204(b) regarding industrial user charges; provision for payment of federal share necessary.

COMMENT: Authority lacking.

22. 402(b)(9)  
EPA Regulation 124.45(e)

State shall insure industrial users of municipal works will comply with Section 307 regarding toxicity and pretreatment requirements.

COMMENT: Authority lacking.

23. 402(b)(9)  
EPA Regulation 124.45(c)

State shall insure industrial users of municipal works will comply with Section 308 requirements to allow inspection, monitoring, and entry by the (Administrator) (Director) or his representative; effluent data to be publicly available.

Section 342-10. See Entry No. 10 for text of this statute.

Section 342-5. Reports submitted to the Department on discharge of waste shall be made available for inspection by the public during established office hours unless such reports contain information of a confidential nature concerning secret processes or methods of manufacture.

COMMENT: Authority present except for public availability, authority for which is questionable.

24. 303(e)  
EPA Regulation 124.93

State must have an approved continuing planning process as set out in Section 303(e)..

COMMENT: Authority lacking.

25. 304(h) (2) (A)  
EPA Regulation 124.61 and 124.62

State program must meet minimum procedural elements, including (A) monitoring requirements, at least comparable to Section 308 requirements.

Section 342-32(10) - See Entry No. 10 for text of this statute.

COMMENT: Authority present.

26. 304(h) (2) (B)  
EPA Regulation 124.63

State program must meet minimum procedural elements, including (B) reporting requirements--information to be made available to the public.

Section 342-32(10)(b) - Reporting requirements.  
See Entry No. 9 for text of statute.

Section 342-5 - Public availability  
See Entry No. 23 for text of statute.

COMMENT:

Section 342-32(10)(b) -  
Authority Present.

Section 342-5 - Qualification  
may invalidate authority.

27. 334(n)(2)(C)  
EPA Regulation 124.73

State program must meet minimum procedural elements,  
including (C) enforcement provisions.

EPA Regulation 124.73

- |     |                       |  |
|-----|-----------------------|--|
| (a) | 342-8, 342-11, 342-12 | Authority present.   |
| (b) | 342-9                 | Authority questionable<br>as no court suit is<br>required and Governor<br>must concur with<br>Director's findings. |
| (c) | 342-12                | Authority present.   |
| (d) | 342-10                | Authority present.   |
| (e) | 342-11                | Authority present.   |
| (f) |                       | Authority lacking - No<br>provision for negligent<br>violation.  |
| (g) |                       | Authority lacking.   |

Section 342-8(a) If the director determines that  
any person is: (1) violating this chapter; or  
(2) violating any rule or regulation  
promulgated under this chapter;  
he may cause written notice to be served on the  
violation specifying a reasonable time during which  
the violation shall be corrected. Hearing Procedures.

(b) If after a hearing pursuant to  
subsection (a) the director shall issue an appro-  
priate order.

(c) Any violation of an order issued  
by the director may at the discretion of the director  
subject the violator to penalties of 342-11 and  
injunction in 342-12.

The director is authorized to impose the penalty  
specified in 342-11(a) and 342-11(c).

Section 342-9. See Entry No. 31 for text.

Section 342-10. See Entry No. 10 for text.

Section 342-11(a). Violations of this chapter or pursuant rules and regulations shall be punished by fines not more than \$2,500. Each pay of violation is a separate offense. Actions under this subsection are civil actions.

(b). Willful violations of Part III of this chapter or any pursuant to rule or regulation is punishable by a fine of \$2,500 - \$25,000 per day of violation or by imprisonment for not more than one year, or by both.

(c). Any person who obstructs the entrance and inspection by any authorized officer of the Department of any building or place he is authorized to enter and inspect shall be fined not more than \$500. Actions under this subsection are civil.

Section 342-12. The Director may institute a civil action . . . for injunctive relief to prevent any violation of this chapter or any rule or regulation thereunder.

28. 304(h)(2)(D)  
EPA Regulation 124.91; 124.94

State program must meet minimum procedural elements, including (D) adequacy of funding, personnel, and manpower; agency board membership shall include no person who receives (now or for previous two years) significant income from permit holders or applicants for permits.

COMMENT: Authority lacking.

29. 402(d)(1)  
EPA Regulation 124.23 and 124.46

State shall transmit to EPA a copy of each permit application and notify EPA of every action related thereto, including each proposed permit.

COMMENT: Authority lacking.

30. 402(d)(?)  
EPA Regulation \_\_\_\_\_

State shall not issue permit if Administrator objects in writing.

COMMENT: Authority lacking.

31. 402(h)  
EPA Regulation \_\_\_\_\_

State or Administrator must be able to stop industrial discharge to municipal plant if such discharge appears to cause municipality to violate permit.

Section 342-9. If the director determines that an imminent peril to the public health and safety is or will be caused by discharge of waste . . . he may, with the approval of the Governor and without public hearing, order any cause or contributor to the discharge to immediately reduce or stop such discharge.

COMMENT: Authority probably lacking as this section only covers situations of "imminent peril to the public health and safety."

32. 402(j)  
EPA Regulation \_\_\_\_\_

State must make permits and applications available to public and available for reproduction.

COMMENT: Authority lacking.

33. 405(c)  
EPA Regulation \_\_\_\_\_

Administrator to determine if State program regarding sewage sludge disposal permits is adequate.

COMMENT: Authority lacking.



SENT BY FAX  
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Enclosures

cc: Dr. Richard E. Marland, Office of Environmental Quality  
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Requirements of 124.41(c) - "A. P." in section 15(c)(2)(c)

ENTRY #15 Requirements of 402(b)(6) - A. P. in section 15(c)(2)(b)  
Requirements of 124.41(b) - A. P. in section 15(c)(2)(b)

ENTRY #16 Requirements of 124.34(b), (d) and (e). See Entry #11

ENTRY #17 See Entry #27

ENTRY #18 Requirements of 402(b)(8) - A. P. in section 22(c)  
Requirements of 124.45 (d)(1) - See Entry #3

ENTRY #19 Requirements of 402(b)(8) - A. P. in section 22(c)  
Requirements of 124.45(d)(2) - See Entry #3

ENTRY #20 Requirements of 402(b)(8) - A. P. in section 22(c)  
Requirements of 124.45(d)(3) - See Entry #3

ENTRY #21 Requirements of 402(b)(9) - A. P. section 22(d)  
Requirements of 124.45(e) - See Entry #3

ENTRY #22 Requirements of 402(b)(9) - A. P. section 22(d)  
Requirements of 124.45(e) - See Entry #3

ENTRY #23 Requirements of 402(b)(9) - A. P. sections 22 and 12  
Requirements of 124.55(c) - See Entry #3

ENTRY #24 Requirements of 303(e) and 124.93 - Authority vague

ENTRY #25 Requirements of 304(h)(2)(A) and 124.61 and .62 - A. P.  
see Entry #9

ENTRY #26 Requirements of 304(h)(2)(B) - A. P. section 12  
Requirements of 124.63 - A. P. see Entry #9

ENTRY #27 Requirements of 304(h)(2)(C) and 124.73:

- 124.73(a) - A. P. in 342-8, 342-11, 342-12
- (b) - A. P. in 342-9, 342-12 see Regional Counsel Opinion No. 137
- (c) - A. P. in 342-12
- (d) - A. P. in 342-10 and see Entry #10
- (e) - A. P. in 342-11 and 342-12
- (f) Authority questionable. Section 342(11)(b) provides punishment for willful or negligent violation of Part III of Act 100 or implementing regulations. It is unclear whether Department of Health Regulations Chapter 45 is issued pursuant to Part I or Part III of Act 100
- (g) Specific authority is questionable. General authority to pass appropriate regulations in section 3 of Act 100
- (h) - A. P. in section 342-11

ENTRY #28 Requirements of 304(h)(2)(D) - A. P. in section 32  
Requirements of 124.94 - A. P. in section 32  
Requirements of 124.91 - Authority inherent in section 15

ENTRY #29 Requirements of 402(d)(1) - A. P. in section 6  
Requirements of 124.23 - A. P. in section 6  
Requirements of 124.46 - A. P. in section 23

ENTRY #30 Requirements of 402(d)(2) - A. P. in 15(c)(2)(c)

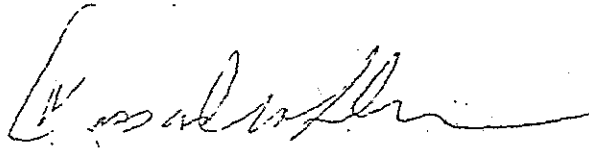
ENTRY #31 Requirements of 402(h) - Authority vague

ENTRY #32 Requirements of 402(j) - A. P. in section 12

ENTRY #33 Requirements of 405(c) - Authority lacking

CONCLUSION:

Under the broad powers granted by section 3 of Act 100, regulations may be promulgated to cover areas where authority is lacking or questionable.



CASSANDRA DUNN

cc: AG (Office of General Counsel)  
Washington, D.C.